Supreme Court, U.S.
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No. 98-1079

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

MARY CAROLE HALICKI,

Petitioner,

v.

LOUISIANA CASINO CRUISES, INCORPORATED; ARTHUR FRANK; LOUISIANA CASINO CRUISES, INCORPORATED, doing business as Casino Rouge Carnival Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MURPHY J. FOSTER, III
BREAZEALE, SACHSE & WILSON, L.L.P.
23rd Floor, One American Place
Post Office Box 3197
Baton Route, Louisiana 70821
(225) 387-4000
Attorneys for Respondents.

Washington, D.C. • THIEL PRESS • (202) 328-3286

Page

TABLE OF CONTENTS

Table of Authorities i

Argument 1

A. Background 2

B. Plaintiff's Interpretation Of Rule 6(e) Was Not Correct 4

C. District Court and Court of Appeals Did Apply *Pioneer*. 5

Conclusion 7

APPENDICES:

Appendix A – Ruling on Motion and Judgment 1a

Appendix B – Ruling on Motions dated May 2, 1997 . . . . . 12a

Appendix C – Decision of the United States Court of Appeals for the Fifth Circuit dated September 1, 1998 . . . . . 15a

Appendix D – Ex Parte Motion to Extend the Time for Filing of Notice of Appeal and Memorandum in Support Thereof 27a

TABLE OF AUTHORITIES

Cases:

Adams v. Trustees of N.J. Brewery Employees' Pension Trust Fund, 29 F.3d 863, 870 (3d Cir. 1994) 4

Cases, continued: Page

Browder v. Director, Illinois Department of Corrections, 434 U.S. 257, 264-5, 98 S.Ct. 556, 561, 54 L.Ed.2d 521, *rehearing denied*, 434 U.S. 1089, 98 S.Ct. 1286, 55 L.Ed.2d 795 (1978) 3, 5

de la Fuente v. Central Elec. Cooperative, Inc., 703 F.2d 63, 64 (3rd Cir. 1983) 3, 5

Flint v. Howard, 464 F.2d 1084, 1087 (1st Cir. 1972) 4

Gribble v. Harris, 625 F.2d 1173, 1174 (5th Cir. 1980) 3, 5

Kyle v. Campbell Soup Co., 28 F.3d 928, 931 (9th Cir. 1994) 6

Martin v. Wainwright, 469 F.2d 1072, *cert. denied*, 411 U.S. 909, 93 S.Ct. 1538, 36 L.Ed.2d 199 (5th Cir. 1972) 3, 5

Parker v. Board of Pub. Utils., 77 F.3d 1289, 1291 (10th Cir. 1996) 4

Pioneer Investment Services Company v. Brunswick Associates Limited Partnership, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993) 2, 5-7

United States v. Brown, 133 F.3d 993, 996 (7th Cir. 1998) 6

Statutes:

Federal Rules of Civil Procedure:

Rule 6(a) 3

Rule 6(b) 4-5

Rule 6(e) 4

Rule 59 2-4

Statutes, continued: Page

Rule 59(e) 3, 4
Rule 60(b) 4

Federal Rules of Appellate Procedure:
Rule 4(a)(1) 5
Rule 4(a)(4) 3, 5
Rule 4(a)(5) 7

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ARGUMENT

This Honorable Court should decline to grant the writ of certiorari sought by Petitioner in this matter, as there is no adverse precedent set by or reversible error con-

*Note that the Petitioner's nomination of Respondents is incorrect. Louisiana Casino Cruises, Incorporated, doing business as Casino Rouge Carnival Corporation is not an existent legal entity. The proper Respondents in this matter are Arthur Frank and Louisiana Casino Cruises, Incorporated doing business as Casino Rouge.

tained in the District Court or Court of Appeals' decisions. Petitioner mischaracterizes the District Court's consideration of her Motion to Alter or Amend Judgment and Ex Parte Motion to Extend the Time for Filing Notice of Appeal as failing to address "excusable neglect" factors set forth in *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). Halicki further mislabels the Court of Appeals's decision as creating a bright-line rule of law that no misconstruction of a procedural rule will be considered excusable neglect. From the evidence offered by Halicki in support of her Motion to Alter or Amend Judgment and in support of her Ex Parte Motion to Extend the Time for Filing Notice of Appeal, the District Court found that excusable neglect or good cause did not exist. The Court of Appeals for the Fifth Circuit affirmed finding no reversible error.

A. Background

Petitioner, Mary Carole Halicki, filed suit against Louisiana Casino Cruises, Inc., d/b/a Casino Rouge (hereinafter "Casino Rouge"), Mr. Arthur Frank and Carnival Corporation alleging discrimination on the basis of her gender in her termination from Casino Rouge. Defendants filed and prevailed upon a Motion for Summary Judgment seeking the dismissal of Plaintiff's claims with prejudice. The District Court's opinion was mailed to the parties. (App. A).

Petitioner filed a Motion to Alter or Amend Judgment of Dismissal on Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 59 (hereinafter "Rule

59") twelve working days[1] after the issuance of the District Court's Judgment. Defendants opposed Plaintiff's Motion as untimely.[2] Because the Plaintiff failed to timely file her Motion pursuant to Rule 59, she did not toll the running of delay for appeal.[3] *Browder v. Director, Illinois Department of Corrections*, 434 U.S. 257, 264-5, 98 S.Ct. 556, 561, 54 L.Ed.2d 521, *rehearing denied*, 434 U.S. 1089, 98 S.Ct. 1286, 55 L.Ed.2d 795 (1978); *Martin v. Wainwright*, 469 F.2d 1072, *cert. denied*, 411 U.S. 909, 93 S.Ct. 1538, 36 L.Ed.2d 199 (5th Cir. 1972); *Gribble v. Harris*, 625 F.2d 1173, 1174 (5th Cir. 1980); *de la Fuente v. Central Elec. Cooperative, Inc.*, 703 F.2d 63, 64 (3rd Cir. 1983).

Halicki subsequently filed a Motion for Leave to File Supplemental Memorandum in Support of Plaintiff's Motion to Alter or Amend Judgment of Dismissal on Motion for Summary Judgment and Ex Parte Motion to Extend the Time for Filing Notice of Appeal, request-

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[1] Pursuant to Federal Rule of Civil Procedure 6(a), when a delay for action is less than ten days, weekends and legal holidays are not counted. The Plaintiff's Motion to Alter or Amend Judgment was filed 16 calendar days following the District Court's Ruling on Motions and Judgment granting Defendants' Motion for Summary Judgment.

[2] "Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of judgment." Federal Rule of Civil Procedure 59(e) (hereinafter "Rule 59(e)").

[3] Federal Rule of Appellate Procedure 4(a)(4) provides in pertinent part:

> "If any party files a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure: . . .
>
> (E) for new trial under Rule 59;" (emphasis added)

ing additional relief under Federal Rule of Civil Procedure 60(b) and in the alternative additional time to file a notice of appeal.

The District Court concluded that Halicki misinterpreted Rule 6(e) of the Federal Rules of Civil Procedure[4] and failed to establish excusable neglect. (App. B). Accordingly, Plaintiff's Rule 59 Motion was untimely. The Fifth Circuit Court of Appeals affirmed the District Court's decision, finding no reversible error. (App. C, p. 22a). Petitioner has now sought review of the Court of Appeals' decision.

B. Plaintiff's Interpretation Of Rule 6(e) Was Flawed.

Plaintiff misconstrued Rule 6(e) of the Federal Rules of Civil Procedure, adding three days for mailing to the time prescribed in Rule 59(e) for filing Motions to Alter or Amend Judgment. As is clear from precedent, this rule cannot be properly applied to orders or judgments entered by the court. *Parker v. Board of Public Utilities of Kansas City, Kansas*, 77 F.3d 1289, 1291 (10th Cir. 1996); *Adams v. Trustees of New Jersey Brewery Employees' Pension Trust Fund*, 29 F.3d 863, 870 (3d Cir. 1994); *Flint v. Howard*, 464 F.2d 1084, 1087 (1st Cir. 1972). It is equally apparent from reading Federal Rule of Civil Procedure 6(b) that the time for filing motions under Rule 59(e) cannot be expanded.[5] Plaintiff's reliance on the three day mailing rule was misplaced.

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[4] "Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period." Federal Rules of Civil Procedure 6(e).

[5] "When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within

[footnote continued]

Inasmuch as Halicki's Motion to Alter or Amend Judgment was not timely filed, it did not toll the running of the appeal delays provided in Federal Rule of Appellate Procedure 4(a)(1).[6]

C. District Court and Court of Appeals did apply *Pioneer*.

Plaintiff's assertion that the District Court did not consider or apply the equitable tolling standards established in *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993), is incorrect. In *Pioneer*, this Court considered whether the period of filing proofs of claim might be equitably extended because of extenuating circumstances which may amount to excusable neglect. This Court adopted five considerations for determining whether excusable neglect exists. Reviewing the case at bar in light of the *Pioneer* standards, the District Court found that "neither excusable neglect [n]or good cause exist[s]."[7] The Court of Appeals affirmed, holding:

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a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), 60(b), and 74(a), except to the extent and under the conditions stated in them." Federal Rule of Civil Procedure 6(b).

[6] Federal Rule of Appellate Procedure 4(a)(4); *Browder, supra; Martin, supra; Gribble, supra; de la Fuente, supra.*

[7] App. B, p. 14a.

> "the [district] court considered all evidence Halicki proffered in support of her claim and made an equitable determination that an extension was unwarranted. . . . **Turning to the district court's application of the *Pioneer* standard to the facts of this case, we detect *no error*."**[8] (emphasis added)

The Court of Appeals' Judgment is subject to the abuse of discretion standard.[9] Because the Fifth Circuit did not abuse its discretion in applying *Pioneer* to the instant matter, certiorari here is unwarranted. Even a strict application of *Pioneer* does not amount to abuse of discretion.

Inadvertence, ignorance of the rules, or mistakes construing rules do not usually constitute excusable neglect. *Kyle v. Campbell Soup Company*, 28 F.3d 928, 931 (9th Cir. 1994); *Pioneer*, 507 U.S. at 392, 113 S.Ct. at 1496. Petitioner at all times admits that her counsel miscalculated the delay for filing Motions under Rule 59(e). No other objective fact was offered or adduced as the reason for the late filing of Plaintiff's Motion to Alter or Amend Judgment. (App. D). As such, the District Court acted well within its discretion, applying the equitable standards set forth in *Pioneer*, and finding:

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[8] App. C, p. 22a.

[9] *United States v. Brown*, 133 F.3d 993, 996 (7th Cir. 1998), *cert. denied*, ___ U.S. ___ , 118 S.Ct. 1824, 140 L.Ed.2d 960 (1998) (" 'The real question here is not whether we would have found . . . excusable neglect but rather whether we should second-guess the trial judge's decision that it was.' *Varhol*, 909 F.2d at 1564. We can disagree with the district court's decision, but we can reverse only if we find that granting the extension was an abuse of his discretion. *Id.*").

> Plaintiff's counsel argues that the calculation of the post-trial motion was in good faith and justified and therefore is excusable neglect. The court finds that neither excusable neglect or good cause exist.

App. B, p. 14a.

CONCLUSION

There is no necessity for granting certiorari in this matter. The District Court acted within its discretion in finding that neither good cause nor excusable neglect existed sufficient to justify relief under Federal Rule of Appellate Procedure 4(a)(5). No adverse precedent is set by the Fifth Circuit Court of Appeals' decision. *Pioneer* was applied. Even a strict application of the appropriate standard does not make for an abuse of discretion.

Respectfully submitted,

MURPHY J. FOSTER, III
Louisiana Bar Roll No. 5779
BREAZEALE, SACHSE
& WILSON, L.L.P.
23rd Floor, One American Place
Post Office Box 3197
Baton Rouge, Louisiana 70821-3197
Telephone: (225) 387-4000
Telecopier: (225) 387-5397
Attorneys for Respondents,
Louisiana Casino Cruises, Inc.,
d/b/a Casino Rouge,
and Arthur Frank.

APPENDIX A

[Filed Mar 4 1997]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

Civil Action No. 95-1957-A

MARY CAROLE HALICKI

VERSUS

LOUISIANA CASINO CRUISES, INC.
d/b/a CASINO ROUGE and
CARNIVAL CORPORATION,
and ARTHUR FRANK

RULING ON MOTIONS

This matter is before the court on a motion of defendant, Louisiana Casino Cruises, Inc. d/b/a Casino Rouge for summary judgment and to strike affidavits filed by plaintiff in opposition to defendant's motion for summary judgment. Plaintiff, Mary Carole Halicki, opposes the motions. Also pending before the court is plaintiff's motion for stay of magistrate's order re-opening discovery. Defendant opposes the motion. Federal question jurisdiction is allegedly based on 42 U.S.C. §2000e-5f and 28 U.S.C. §1343(a)(4).

Background

Plaintiff began working for Casino Rouge on May 9, 1994 as Marketing Manager. Arthur Frank, the general manager at all times relevant, had offered plaintiff the position of Marketing Manger for Casino Rouge with a

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DATE 3-4-97
NOTICE MAILED TO: Carleton Foster
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$50,000 per annum salary. Casino Rouge employed plaintiff continuously in this position until May 4, 1995 when she was informed by Frank that her position had been terminated. Plaintiff filed suit alleging that Casino Rouge's actions toward plaintiff violated Title VII of the Civil Rights Act of 1964, specifically 42 U.S.C. §2000e-2(a).[1] A "right-to-sue" letter has been issued to plaintiff.

Arguments

Plaintiff claims that defendant discriminated against her on the basis of gender with respect to her compensation, terms, conditions, and privileges of employment and with respect to her discharge. Defendant first argues that plaintiff's Charge of Discrimination filed with the Equal Employment Opportunity Commission (EEOC) limits this action to discriminatory discharge and does not include a claim for discrimination with respect to her compensation, terms, conditions, and privileges of employment. Defendant asserts that with respect to plaintiff's allegation of discriminatory discharge, the reason for discharge was a non-discriminatory one. Defendant claims plaintiff was terminated as part of a reorganization of the marketing department at Casino Rouge.

Law

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that

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[1] 42 U.S.C. §2000e-2(a) provides:

It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

the moving party is entitled to a judgment as a matter of law."[2] The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). After a proper motion for summary judgment is made, the non-movant must set forth specific facts showing that there is a genuine issue for trial. The court must resolve all factual inferences in favor of plaintiff. **Abbott v. Equity Group, Inc.** 2 F.3d 613 (5th Cir. 1993).

A. The Scope of Plaintiff's EEOC Charge

As mandated by Title VII, plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC) before filing this action. A preliminary issue, therefore, is the scope of plaintiff's EEOC charge.

A Title VII judicial complaint is limited to the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination. **Sanchez v. Standard Brands, Inc.**, 431 F.2d 455 (5th Cir. 1970). The administrative charge requirement serves the important purposes of giving the charged party notice of the claim and "narrowing the issues for prompt adjudication and decision." **Park v. Howard University**, 71 F.3d 904, 907 (D.C. Cir. 1995).

The Plaintiff's EEOC charge reads:

> I believe that my termination was motivated by, and the result of, discrimination against me because of my sex, female, and in retaliation for opposing practices made unlawful under Title VII of the Civil Rights Act of 1964, as amended.

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[2] Fed. R. Civ. Pro. 56(c).

> At the time of my termination, the General Manager informed me that my dismissal was due to a reorganization of the Marketing Department. This proffered excuse for my termination was merely a pretext for my unlawful termination. Indicative of Respondent's unlawful animus towards female employees is the all male composition of Respondent's Executive (operations) Committee to which I and other women employees were denied membership.

Defendant argues that the only employment decision complained in plaintiff's EEOC charge was her termination. Plaintiff's charge cites May 4, 1995 (the date of her termination) as both the "earliest" and "latest" date of the alleged discrimination and did not check the "continuing action" option regarding the date of discrimination

Plaintiff argues that the statements in her charge directly expresses, or at the very least implicates, discrimination against her "with respect to her compensation, terms, conditions and privileges of employment. Plaintiff argues that within the expressed words of the EEOC charge, Ms. Halicki alleges that Casino Rouge discriminated against women in selecting its Executive (Operations) Committee.

Discussion

Courts should not strictly interpret the scope of an EEOC complaint, but should liberally construe the complaint. **Sanchez** at 465. This rule is based on the conclusion that most of the charges filed with the EEOC are prepared by people without legal training and without the assistance of counsel. **Ghahramani v. BASF Corp.**, 755 F.Supp 708 (M.D. La. 1991).

A court, however, cannot allow liberal interpretation of an administrative charge to permit a litigant to bypass the Title VII administrative process. **Park** at 907. The goals behind the prior resort to administrative relief would be frustrated if the filing of a formal charge with the EEOC would open up the possibility of judicial challenges to any related conduct that took place in connection with the employment relationship. **Id.** at 908.

The court finds that, however read, Ms. Halicki's charge does not include a claim for discrimination against Ms. Halicki with respect to her compensation, terms, conditions, and privileges of employment was because of her sex, female.

B. Prima Facie Case of Discrimination in Discharge

In a typical disparate treatment discharge case, the plaintiff must prove a prima facie case of discrimination by showing that (1) he is a member of a protected group; (2) he was qualified for the job that he held; (3) he was discharged; and (4) after his discharge, his employer filled the position with a person who is not a member of the protected group. **Vaughn v. Edel**, 918 f.2d 517, 521 (5th Cir. 1990). Where plaintiff presents a prima facie case, the employer must rebut the presumption of gender discrimination by articulating a legitimate non-discriminatory reason for the adverse employment action. If the defendant proffers a non-discriminatory reason, plaintiff can avoid summary judgment by presenting evidence which when taken as a whole, (1) creates a fact issue as to whether the employer's stated reasons were what actually motivated the employer and (2) creates a reasonable inference that gender was a determinative factor in the employment actions in question. **Atkinson v. Denton Publishing Company**, 84 F.3d 144, 149 (5th Cir. 1996).

Discussion

Because plaintiff does not have evidence of the fourth factor, defendant argues that plaintiff cannot establish a prima facie case. Proof, however, that the defendant filled plaintiff's position with a person who is not a member of the protected group is not the only way to establish an unlawful inference of discrimination. **Jones v. Western Geophysical Company of America**, 669 F.2d 280, 284 (5th Cir. 1982). All that plaintiff need do is prove by a preponderance of the evidence that she was discharged from the position from which she was qualified "under circumstances" which give rise to an inference of unlawful discrimination. The underlying purpose of the fourth element is to establish an unlawful inference of discrimination. But proof that the employer replaced the fired minority employee with a nonminority employee is not the only way to create such an inference. **Id.** The court will examine all of the evidence that has been adduced for other indicia of discrimination relating to plaintiff's discharge and determine whether it is more likely than not that the defendant's actions were based on illegal discriminatory criteria.

Plaintiff produced numerous affidavits to demonstrate that the employer intended to discharge her because of her gender. The essence of these affidavits is that plaintiff's two immediate superiors, General Manager Art Frank and Vice President and Director of Marketing, J. Carroll Cotten displayed a sexist attitude toward women employees at Casino Rouge in positions of responsibility including towards plaintiffs and others.

With respect to Cotten, the affidavits provide general allegations that Cotten would defer to male employee's opinions, but never to the opinions of women employees, and that Cotten made numerous derogatory remarks

concerning the working abilities of Casino Rouge women employees. The affidavits provide general allegations that Cotten resented plaintiff as a female manager and took every opportunity to criticize her and limit her job responsibilities as he was threatened by her. According to the affiants, they were of the opinion plaintiff's termination was on the basis of her sex, female, in that both Cotten and Frank treated her differently than male managers whom they supervised.

These general allegations are insufficient for demonstrating an inference necessary to show defendant's actions were based on illegal discriminatory criteria. Even in discriminatory discharge cases, where the plaintiff can rarely present direct, subjective evidence of an employer's actual motive, the plaintiff cannot survive summary judgment with unsupported allegations and speculations, but rather must point to specific facts detailed in affidavits and depositions, that is, names, dates, incidents, and supporting testimony, giving rise to an inference of discriminatory animus. **Hoeppner v. Crotched Mountain Rehabilitation Ctr.**, 31 F.3d 9 (1st Cir. 1994). Plaintiff has failed to do this with respect to her allegations against Cotton.

Plaintiff produces affidavits with the same general allegations against Frank as with Cotten. For instance, plaintiff refers to the affidavit of Debi Ball, the former Casino Rouge Marketing Coordinator. Ms. Ball states that Frank, despite his status as General Manager, evaluated women on what they could do for him socially, or otherwise treated women as second class employees. Again, such general opinions are insufficient.

Plaintiff does provide some fact specific evidence in an effort to demonstrate discriminatory discharge. Plaintiff argues:

> substantial evidence exists which supports that one of the reasons Frank dismissed Ms. Halicki was in retallation for her counseling of Casino Rouge employee Jim Vambaketes concerning the fact that Frank was having an illicit affair with Casino Rouge employee Kari Vambaketes, Jim's wife.

Plaintiff argues that this action by Frank was sex-based discrimination due to the fact that several male Casino Rouge manages also counseled Jim Vambaketes but were not similarly dismissed nor were they even disciplined. Plaintiff points to an affidavit of Donna Koester, Casino Rouge's former Secretary/Treasurer and Project Coordinator, who stated in her deposition that she doubted that Halicki was let go as a result of a marketing re-structuring. Based upon her working relationship with Art Frank, Ms. Koester "felt that" (was of the opinion that) Art Frank 'restructured' the department as a convenient excuse for covering up his relationship with Kari Vambaketes.

Even assuming that the real reason Art Frank terminated plaintiff was because plaintiff counseled Jim Vambaketes, this alone would not infer gender based discrimination, even if other male employees weren't fired for counseling Jim Vambaketes.[3] An employer may discharge an employee for a good reason, mistaken reason, or no reason at all and will not violate Chapter VII as long as the decision is not based on gender.

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[3]Plaintiff asserts that defendant's treatment of her upon dismissal was in sharp contrast to that of another male Casino Rouge employee, Nigel White. Plaintiff refers to the manner in which she was dismissed in which she alleges she was escorted off of the property, was barred from the property and had to sign a waiver for any rights she had for legal redress from Casino Rouge.

The court finds that plaintiff has failed to set forth substantial evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions. A mere scintilla of evidence is insufficient to present a question for the jury. **Rhodes v. Guiberson Oil Tools**, 75 F.3d 989, 993 (5th Cir. 1996) (quoting **Boeing Co. v. Shipman**, 411 F.2d 365 (5th Cir. 1969) (en banc)).

Moreover, even if the court assumed plaintiff has set out a prima facie case, in order to avoid summary judgment, plaintiff must carry the burden of production and show that there is evidence that the non-discriminatory reason for her termination is pretextual, i.e. that the real reason for discharge was plaintiff's gender. In order to do this, plaintiff would have to overcome the "same actor" inference.[4] **Walker v. Southern Holdings, Inc.** 934 F.Supp. 197, 199 (M.D. La. 1996). The "same actor" inference arises where a plaintiff was terminated by the same person or persons who hired her and creates an assumption that gender discrimination was not the motive behind the termination. **Id.** As recognized by the Fifth Circuit in **Brown v. CSG Logic, Inc.**, 82 F.3d 651 (5th Cir. 1996), the Fourth Circuit best enunciated the rationale for this inference in Proud v. Stone, saying that:

> "[c]laims that employer animus exists in termination but not in hiring seem irrational.' From the standpoint of the putative discriminator, '[i]t hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job.'[5]

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[4]Plaintiff alleges Art Frank hired and fired her. See Complaint par. 2 and 22.

[5]Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991).

Applying the "same actor" inference to the allegations set forth in the complaint, an inference arises that plaintiff's discharge was not motivated by plaintiff's gender. Plaintiff alleges that in the early months of March 1994, Art Frank contacted plaintiff multiple times concerning her possible employment with Casino Rouge and subsequently offered plaintiff the position of Marketing Manager.[6] Plaintiff claims that one year later Frank called plaintiff into a meeting, and in a very hostile, belligerent and offensive manner, informed her that her position had been terminated effective immediately based on an alleged reorganization of the marketing department.[7]

The court finds that plaintiff has failed to present a prima facie case of gender discrimination. Defendant's motion for summary judgment is hereby GRANTED and judgment shall be entered in favor of defendant. all other motions pending before the court are rendered moot.

Baton Rouge, Louisiana, March 3, 1997.

/s/ John V. Parker
John V. Parker, Chief Judge
Middle District of Louisiana

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[6]Complaint, paragraphs 2,3.

[7]Complaint, paragraphs 20-22.

[Filed Mar 5 1997]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

Civil Action No. 95-1957-A

MARY CAROLE HALICKI

VERSUS

LOUISIANA CASINO CRUISES, INC. d/b/a CASINO ROUGE, and CARNIVAL CORPORATION and ARTHUR FRANK

JUDGMENT

For the written reasons assigned and filed herein:

IT IS ORDERED ADJUDGED AND DECREED that the motion for summary judgment filed on behalf of defendants is hereby GRANTED and this action is hereby DISMISSED.

Baton Rouge, Louisiana, March 5, 1997.

/s/ John V. Parker
John V. Parker, Chief Judge
Middle District of Louisiana

APPENDIX B

[Filed May 2 1997]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

Civil Action No. 95-1957-A

MARY CAROLE HALICKI

VERSUS

LOUISIANA CASINO CRUISES, INC.
d/b/a CASINO ROUGE, ET AL.

RULING ON MOTIONS

This matter is before the court on a motion by plaintiff to alter or amend this court's judgment of March 5, 1997. Defendants oppose the motion on the basis that it is untimely. Plaintiff also has filed a motion to extend the time for filing of a notice of appeal pursuant to Fed. R. App. P. 4(a)(5). This court has federal question jurisdiction based on 42 U.S.C. §2000e-5f and 28 U.S.C. §1343(a)(4).

Discussion

Plaintiff filed suit on November 29, 1995 alleging defendants had violated Title VII of the Civil Rights Act of 1964. On March 4, 1997, this court granted defendants' motion for summary judgment and entered judgment in favor of defendants on March 5, 1997. On March 21, 1997, plaintiff filed a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e).

Rule 59(e) reads: "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." Fed. R. Civ. P. 6(a) directs how the time period is to be computed and provides in pertinent part:

> the day of the act from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday... When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

Pursuant to Rule 6(a), March 19, 1997 was the last day for plaintiff to timely file her motion to amend the judgment. Plaintiff does not argue that she filed her motion to amend within the ten days allowed, but argues that Fed. R. Civ. P. 6(e) applies, extending the time for which plaintiff could file. Rule 6(e) provides:

> [w]henever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party by mail, 3 days shall be added to the prescribed period.

The court agrees with defendants that the motion is untimely and must be denied. Under Rule 59(e) the time to move runs from the "entry of judgment," not from the time parties receive notice. Moreover, Rule 6(e) is inapplicable because the court's judgment was not the subject of "service," whether or not the mails were used to transmit the judgment from the Clerk to a party.

Plaintiff also filed an alternative motion to extend the time for filing of a notice of appeal pursuant to Fed. R. App. P. 4(a)(5) in the event the court would find her

motion to alter or amend the judgment untimely. Rule 4(a)(5) provides:

> [t]he district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a) [4(a) requires a notice of appeal to be filed with the clerk of the district court within 30 days after the date of entry of judgment].

Plaintiff's counsel argues that the calculation of the post-trial motion was in good faith and justified and therefore is excusable neglect. The court finds that neither excusable neglect or good cause exist. Furthermore, the court declines to grant relief from the court's judgment as requested by plaintiff under Fed. R. Civ. P. 60(b).

Accordingly, plaintiff's motions are hereby DENIED.

Baton Rouge, Louisiana, May 2, 1997.

/s/ John V. Parker
John V. Parker, Chief Judge
Middle District of Louisiana

APPENDIX C

[Filed Sep 01 1998]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-30508

MARY CAROLE HALICKI,

Plaintiff-Appellant,

VERSUS

LOUISIANA CASINO CRUISES, INC;
ARTHUR FRANK,

Defendants,

LOUISIANA CASINO CRUISES, INC.,
d/b/a Casino Rouge Carnival Corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Louisiana

Before JOLLY, SMITH, and BARKSDALE, Circuit Judges. JERRY E. SMITH, Circuit Judge:

Mary Halicki appeals adverse rulings in her lawsuit for employment discrimination. We affirm.

I.

Halicki worked for defendant Louisiana Casino Cruises, Inc., doing business as Casino Rouge, and was terminated. She sued under title VII, claiming that her termination was the result of sex discrimination.

The district court granted Casino Rouge's motion for summary judgment, and entered final judgment on March 5, 1997. Under FED. R. APP. P. 4(a) (1), Halicki had thirty days therefrom in which to file notice of appeal.[1] She counted on filing a timely motion under FED. R. CIV. P. 59(e), however, which would have the effect of suspending the thirty-day period. *See* FED. R. APP. P. 4(a) (4) (C).

Halicki's counsel claims that because he received notice of the final judgment by mail, he thought the three-day mail service provisions of FED. R. CIV. P. 6(e) applied to enlarge the ten days he otherwise would have from the entry of final judgment to file a rule 59(e) motion. Apparently unaware that the plain language of the rules, well-settled hornbook law, and every other circuit to address the issue had rejected the applicability of rule 6(e) to rule 59(e), the attorney waited until the tenth day to *mail* the rule 59(e) motion, causing it to arrive at the district court two days late.

Casino Rouge, in its opposition to the rule 59(e) motion, objected to its untimeliness. Halicki moved for enlargement of time for filing a notice of appeal under FED. R. APP. P. 4(a) (5) because of "excusable neglect"

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[1] "A timely notice of appeal is necessary to the exercise of appellate jurisdiction." *United States v. Cooper*, 135 F.3d 960, 961 (5th Cir. 1998) (citing *United States v. Robinson*, 361 U.S. 220, 224 (1960)).

in misconstruing rule 6(e); for, if her rule 59(e) motion was untimely, the thirty-day notice of appeal clock did not toll, and her time to appeal had expired. *See Gribble v. Harris*, 625 F.2d 1173, 1174 (5th Cir. Unit A 1980) (per curiam); FED. R. APP. P. 4(a) (4). Halicki also argued that even if the rule 59(e) motion was untimely, the court should construe it as a FED. R. CIV. P. 60(b) motion for relief from judgment. The district court denied, and Halicki timely appealed, the denial of her rule 59(e), rule 4(a) (5), and rule 60(b) motions.

II.

Rule 6(e), FED. R. CIV. P., provides: "Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period *after the service of a notice* or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period." (Emphasis added.) "Mere quotation of Rule 6(e) shows why it is inapplicable to Rule 59(e) motions. The period for filing a Rule 59(e) motion does not—in the words of Rule 6(e) —begin with 'service of a notice.' " *Derrington-Bey v. District of Columbia Dep't of Corrections*, 39 F.3d 1224, 1225 (D.C. Cir. 1994).[2] Rather, rule 59(e) provides that "[a] motion to alter or amend the judgment shall be served not later than 10 days *after entry of the judgment.*" (Emphasis added.)

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[2]All other circuits to have addressed this issue have found that rule 6(e) does not apply to rule 59(e) motions. *See Parker v. Board of Pub. Utils.*, 77 F.3d 1289, 1291 (10th Cir. 1996) (holding the same); *Adams v. Trustees of N.J. Brewery Employees' Pension Trust Fund*, 29 F.3d 863, 870 (3d Cir. 1994) (same); *Flint v. Howard*, 464 F.2d 1084, 1087 (1st Cir. 1972) (per curiam) (on petition for rehearing); *cf. Cavaliere v. Allstate Ins. Co.*, 996 F.2d 1111, 1113-14 (11th Cir. 1993) (rejecting the application of rule 6(e) to a motion filed under rule 59(b)).

"Rule 6(e) does not apply to time periods that begin with the filing in court of a judgment or an order. Thus, Rule 6(e) does not apply to the 10-day period that runs from entry of judgment for moving to alter or amend judgment pursuant to Rule 59(e)." 1 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE §6.05 [3], at 6-35 (3d ed. 1998) (citations omitted). Under the plain language of the rules, therefore, the district court correctly found that Halicki's rule 59(e) motion was untimely filed two days after the tenth day from entry of judgment.

III.

Halicki argues that even if she misapplied rule 6(e), her construction of the rules in this instance—an issue of first impression in this circuit—should constitute "excusable neglect" under rule 4(a) (5). Thus, she argues, the district court should have granted her an extension to file a notice of appeal on the underlying summary judgment.

Rule 4(a) (5) provides: "The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a)." Accordingly, we face three issues: (1) what the correct standard is for the evaluation of "excusable neglect"; (2) whether the court employed the correct standard in evaluating "excusable neglect"; and (3) whether, if the court used the correct standard, it reached a tenable result.

In *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 395-97 (1993), the Court interpreted "excusable neglect" in the context of the bankruptcy rules. It stated:

> Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable," we conclude that the determination is at bottom an equitable one, taking account all of the relevant circumstances surrounding the party's omission. These include . . . the danger of prejudice to the [non-moving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Id. at 395.

We have adopted the *Pioneer* standard of "excusable neglect" for purposes of FED. R. APP. P. 4(b), which governs *criminal* matters. *See United States v. Clark*, 51 F.3d 42, 43-44 (5th Cir. 1995). Like rule 4(a)(5), rule 4(b) provides that "[u]pon a showing of excusable neglect, the district court may . . . extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision."

In *Clark*, defense counsel, not unlike Halicki's attorney, misconstrued the federal criminal rules and their applicability to the amount of time the defendant had to file his notice of appeal. *See Clark*, 51 F.3d at 42-43. The district court found that our caselaw interpreting FED. R. APP. P. 4 prohibited such conduct from ever constituting "excusable neglect." *See id.* at 43. On appeal, we disagreed, holding that the intervening decision in *Pioneer* abrogated our previous caselaw stringently construing "excusable neglect" in rule 4(b). We noted that under the new, more liberal *Pioneer* standard, the district court could—in its discretion—find that Clark's attorney's misreading of the rule constituted "excusable neglect." *See id.* at 44.

We specifically declined, however, to order the district court, on remand, to find that counsel's conduct *must* constitute "excusable neglect." *See id.* ("[W]e do not hold that it would be an abuse of discretion for the district court, on remand, to find no excusable neglect on these facts."). Indeed, we noted, from *Pioneer*, that a misconstruction of the rules—especially when their language is plain—will rarely satisfy the "excusable neglect" standard. *See Pioneer*, 507 U.S. at 392 ("[I]gnorance of the rules [and] mistakes construing the rules do not usually constitute 'excusable' neglect."); *see also Clark*, 51 F.3d at 44 (noting the same in the context of that case).

We first must determine whether the reasoning in *Clark* applies, as well, to rule 4(a) (5)—that is, to *civil* cases. Although we could make distinctions between the civil and criminal spheres, the argument for applying the *Pioneer* interpretation to the civil context is fairly conclusive.

First, both rule 4(a) (5) and rule 4(b) use "excusable neglect" as the standard for an extension of the time for filing a notice of appeal. We are mindful of the "basic canon of statutory construction that identical terms within an Act bear the same meaning." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) (citations omitted).

Second, the *Pioneer* Court's construction of "excusable neglect" was apparently generally applicable, as the Court claimed to be adopting "the commonly accepted meaning of the phrase." *Pioneer*, 507 U.S. at 391. For this reason, courts of appeals have readily found the standard applicable to rule 4(a)(5), *see, e.g., Thompson v. E.I. DuPont de Nemours & Co.*, 76 F.3d 530, 533 (4th

Cir. 1996), as well as to rule 4(b), *see Clark*, 51 F.3d at 43-44.

Finally, *Pioneer* was a civil bankruptcy proceeding, in which the Court noted that the circuits "similarly have divided" over the term of "excusable neglect" in the context of rule 4(a) (5). *See Pioneer*, 507 U.S. at 387 n.3. We therefore read the Court's opinion, by its own terms, to cover this issue.[3]

Proceeding under the *Pioneer* standard, we face the harder question of how the district court made its "excusable neglect" inquiry. That is, we must decide whether it used the *Pioneer* standard, or instead employed the older, more stringent metric in making its "excusable neglect" determination. If we conclude that the court used the *Pioneer* standard, we must then decide whether it did so correctly.

Halicki does not appear to have proffered any standard of "excusable neglect" to the district court. Instead, she argues there, as here, that *Pioneer* and *Clark* hold that

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[3] In extending *Pioneer* to rule 4(a) (5), we follow each of our sister circuits to have addressed the issue. *See Advanced Estimating Sys., Inc. v. Riney*, 77 F.3d 1322, 1323 (11th Cir. 1996) (per curiam); *Thompson*, 76 F.3d at 533 ("While in *Pioneer* the Court interpreted the phrase 'excusable neglect' as used in a rule of bankruptcy procedure, it is evident that the Court intended its definition of 'excusable neglect' to be equally applicable to Federal Rule of Appellate Procedure 4(a) (5), as every appellate court to consider the applicability of *Pioneer* to Rule 4(a) (5) and Rule 4(b) (criminal appeals) has concluded."); *Fink v. Union Cent. Life Ins. Co.*, 65 F.3d 722, 724 (8th Cir. 1995); *Reynolds v. Wagner*, 55 F.3d 1426, 1429 (9th Cir. 1995); *Virella-Nieves v. Briggs & Stratton Corp.*, 53 F.3d 451, 454 n.3 (1st Cir. 1995); *City of Chanute v. Williams Natural Gas Co.*, 31 F.3d 1041, 1046 (10th Cir. 1994); *Weinstock v. Cleary, Gottlieb, Steen & Hamilton*, 16 F.3d 501, 503 (2d Cir. 1994).

misconstruction of procedural rules *necessarily* should result in a finding of "excusable neglect" where no prejudice results to the opposing party. The court correctly disagreed with this proposition, *see Pioneer*, 507 U.S. at 392, and without discussing its reasoning further, denied the motion for extension of time to file notice of appeal.

It appears, however, that the court considered all evidence Halicki proffered in support of her claim and made an equitable determination that an extension was unwarranted. Under *Pioneer* and *Clark*, no more is required.[4]

Turning to the district court's application of the *Pioneer* standard to the facts of this case, we detect no error. The nature of Halicki's mistake weighs heavily against a finding of excusable neglect.[5]

Although in *Clark* we left open the possibility that some misinterpretations of the federal rules may qualify as excusable neglect, such is the rare case indeed. Where, as here, the rule at issue is unambiguous, a district court's determination that the neglect was inexcusable is virtu-

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[4]Halicki argues that granting an extension would cause no prejudice to Casino Rouge. Given this showing alone, however, the district court was justified in finding that counsel's misconstruction of the rules was not "excusable" neglect: "The word 'excusable' would be read out of the rule if inexcusable neglect were transmuted into excusable neglect by a mere absence of harm." *Prizevoits v. Indiana Bell Tel. Co.*, 76 F.3d 132, 134 (7th Cir. 1996).

[5]*See Advanced Estimating Sys., Inc. v. Riney*, 130 F.3d 996, 998 (11th Cir. 1997) (mistaken interpretation or ignorance of FED. R. APP. P. 4(a) (4) (F)); *Prizevoits v. Indiana Bell Tel. Co.*, 76 F.3d 132, 134 (7th Cir. 1996) (mistaken interpretation or ignorance of FED. R. CIV. P. 6(b)); *Kyle v. Campbell Soup Co.*, 28 F.3d 928, 931-32 (9th Cir.) (mistaken interpretation of FED. R. CIV. P. 6(e)), *cert. denied*, 513 U.S. 867 (1994); *Weinstock v. Cleary, Gottlieb, Steen & Hamilton*, 16 F.3d 501, 503 (2d Cir. 1994) (mistaken interpretation of FED. R. APP. P. 4(a) (4)).

ally unassailable. Were it otherwise, "almost every appellant's lawyer would plead his own inability to understand the law when he fails to comply with a deadline." *Riney*, 130 F.3d at 998. Accordingly, we cannot say that the court abused its discretion in denying Halicki's motion to extend the notice of appeal clock under rule 4(a) (5).

IV.

The only issue before us, therefore, is whether the district court properly disposed of Halicki's motion under rule 60(b) for relief from judgment because of her newly "discovered" (or proffered) evidence and because of the district court's alleged mistake of law at summary judgment. "A 'timely' appeal from a 'ruling on a Rule 60(b) motion' may be taken under FED. R. APP. P. 4(a) (5), although the court of appeals 'may review the ruling only for abuse of discretion' and although the appeal 'does not bring up the underlying judgment for review.' " *Derrington-Bey*, 39 F.3d at 1226 (quoting *Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 263 n. 7 (1978)).

"[T]he decision to grant or deny relief under Rule 60(b) lies within the sound discretion of the district court and will be reversed only for abuse of that discretion." *Edwards v. City of Houston*, 78 F.3d 983, 995 (5th Cir. 1996) (en banc). "Furthermore, we have repeatedly held that in order to prevail on a motion under FED. R. CIV. P. 60(b) (2) based upon newly presented evidence, the movant must demonstrate among other things that it exercised due diligence in obtaining the information." *Williams v. Chater*, 87 F.3d 702, 705 n. 2 (5th Cir. 1996) (citing *Government Fin. Servs. One Ltd. Partnership v. Peyton Place, Inc.*, 62 F.3d 767, 771

(5th Cir. 1995); *New Hampshire Ins. Co. v. Martech USA, Inc.*, 993 F.2d 1195, 1199 (5th Cir. 1993)).

Casino Rouge initially opposed Halicki's rule 60(b) motion because it was originally filed as an untimely rule 59(e) motion. Casino Rouge argues that Halicki was required to file a separate rule 60(b) motion for the lower court to consider it as such; that is, Casino Rouge argues that Halicki could not use her untimely rule 59(e) motion as a motion under rule 60(b).

Casino Rouge's argument in this regard cuts against the grain of the liberal Federal Rules of Civil Procedure. "As with untimely Rule 52(b) motions, and untimely Rule 59(a) motions, a court may treat an untimely Rule 59(e) motion to alter or amend the judgment as if it were a Rule 60(b) motion if the grounds asserted in support the Rule 59(e) motion would also support Rule 60(b) relief." 12 MOORE ET AL., *supra*, §60.03 [4], at 60-24.[6] Here, the grounds Halicki asserted in her rule 59(e) motion—new evidence and mistake—would also support a rule 60(b) motion.

Halicki contends that having properly considered the rule 60(b) motion, the district court was required to pay special solicitude to her claim because she never had an "examination of the full merits of the cause," which, in her view, means a trial. Indeed, "where denial of relief [under rule 60(b)] precludes examination of the full merits of the cause, even a slight abuse of discretion may justify reversal." *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. Unit A Jan. 1981) (citation omitted).

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[6] *See Damiano v. FDIC*, 104 F.3d 328, 332 n.4 (11th Cir. 1997) (noting the same); *Edwards*, 78 F.3d at 995 (same); *Helm v. Resolution Trust Corp.*, 43 F.3d 1163, 1166-67 (7th Cir. 1995) (same).

Our caselaw allows for more leniency in opening up *default* judgments, not those in which the court has had a chance to evaluate the merits. *See, e.g., Harrell v. DCS Equip. Leasing Corp.*, 951 F.2d 1453, 1459 (5th Cir. 1991); *see also* 12 MOORE ET AL., *supra*, §60.22[3] [a], at 60-69 to 60-70. "Summary judgment is a judgment on the merits; it has the same effect as if the case had been tried by the party against whom judgment is rendered and decided against him." *Daigle v. Opelousas Health Care, Inc.*, 774 F.2d 1344, 1348 (5th Cir. 1985). Accordingly, we reject Halicki's invitation to conduct a more searching review and instead give our usual deference to the district court's denial of rule 60(b) relief. *See Crutcher v. Aetna Life Ins. Co.*, 746 F.2d 1076, 1082 (5th Cir. 1984) (reviewing a denial of a rule 60(b) motion for abuse of discretion).

To the extent that the "newly discovered" evidence is grounds for Halicki's rule 60(b) motion, Halicki has made no showing that the evidence in the newly proffered affidavits was "newly discovered," in that it was not obtainable prior to summary judgment had she exercised "due diligence." Indeed, all but one of the supplemental affidavits proffered with the rule 60(b) motion were from the same witnesses who had offered affidavits before summary judgment. The refusal to grant rule 60(b) relief on this paltry showing of "newly discovered" evidence was certainly not an abuse of the court's equitable powers to reopen the judgment.

Halicki's second theory for rule 60(b) relief—that the district court applied the wrong legal standard at summary judgment—is not one that readily fits within one of the enumerated grounds for relief outlined in the rule. Although it arguably could fall within the scope of rule

60(b) (1), mistake,[7] or rule 60(b) (6), the "catch-all" provision, it should not, in this case, because the ground—the district court's error of law—appears to be no more than a mask for Halicki's forfeited appeal of the court's summary judgment ruling.[8]

"Rule 60(b) is not a substitute for a timely appeal. Courts should not grant relief when the moving party has not been diligent in protecting its own rights by filing an appeal from an adverse judgment." 12 MOORE ET Al., *supra*, §60.22 [2], at 60-67.[9] Even assuming *arguendo* that the district court made an error of law at summary judgment, it had the discretion to deny Halicki's rule 60(b) motion to prevent her end-run of the normal appellate process for correcting legal error.

AFFIRMED.

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[7] A rule 60(b) challenge on this ground is usually thought to encompass "an obvious error of law." *Hill v. McDermott, Inc.*, 827 F.2d 1040, 1043 (5th Cir. 1987). The alleged error in this case is not such a mistake.

[8] *See, e.g., Travelers Indem. Co. v. United States*, 728 F.2d 699, 703 (5th Cir. 1984) ("Although Travelers uses the war-weary rhetorical epithet of 'manifest' or 'beyond question' in depicting the claimed error, the briefs demonstrate at best only that the question is arguable.").

[9] *See Pryor v. United States Postal Serv.*, 769 F.2d 281, 288-89 (5th Cir. 1985) (noting that "[w]ere this Court to make an exception to finality of judgment each time a hardship was visited upon the unfortunate client of a negligent or inadvertent attorney, even though the result be disproportionate to the deficiency, courts would be unable to ever adequately redraw that line again, and meaningful finality of judgment would largely disappear").

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

[Filed Apr 18 1997]

Civil Action No. 95-1957

Division "A"
Section "M2"
MAGISTRATE (Jury Trial)

MARY CAROLE HALICKI

VERSUS

LOUISIANA CASINO CRUISES, INC.
d/b/a CASINO ROUGE

EX PARTE MOTION TO EXTEND THE TIME FOR FILING OF NOTICE OF APPEAL

NOW COMES, plaintiff Mary Carole Halicki ("Ms. Halicki") and pursuant to the requirements of Federal Rule of Appellate Procedure ("FRAP") 4(a)(5), moves this Honorable Court for an extension of time to file her notice of appeal of the Court's March 5, 1997 judgment in the event that the Court determines that Ms. Halicki's post-trial motion filed on March 21, 1997 did not timely suspend the thirty day time period for her appeal of right from the entry of judgment.

Equity supports that the resolution of this case should be made on the legal merits presented by Ms. Halicki

and by Casino Rouge, and further supports that Ms. Halicki's right of appeal of the Court's grant of summary judgment should not be barred by an alleged two day delay in the filing of Ms. Halicki's post-trial motions. The date of filing Ms. Halicki's post-trial motions by her counsel was based upon a good faith interpretation of Federal Rule of Civil Procedure ("FRCP") 6(e), which is an issue of first impression within this Circuit.

In the event that the court does find that FRCP 6(e) does not apply to the computation period, such a miscalculation by counsel resulted in a two day delay in her submission and this technicality should not be used to deprive plaintiff of her right to a full appeal of the court's dismissal of her case, particularly when the dismissal was made on a motion for summary judgment. Casino Rouge cannot claim any prejudice where Ms. Halicki is seeking an extension of two weeks from the date on which her notice of appeal would have been due (April 4, 1997) if her post-trial motion did not suspend the delay for her appeal. FRAP 4(a)(5) was designed precisely to prevent the harsh and inequitable application of the thirty day time limit from entry of judgment otherwise required by FRAP 4(a)(1) under these circumstances.

For the above and foregoing reasons, and the reasons more specifically set forth in the attached supporting memorandum, plaintiff Mary Carole Halicki respectfully prays that her motion for leave of court to extend the time for filing of her notice of appeal be granted, in the event that the court does not otherwise grant Ms. Halicki relief from the March 5,1997 judgment of dismissal

under either FRCP 59(e) or the various subparts of FRCP 60(b).

Respectfully submitted,

/s/ Stephen C. Carleton
Stephen C. Carleton (Bar #14132)
Timothy J. Poche (Bar #21823)
Simoneaux & Carleton, L.L.C.
8555 United Plaza Boulevard, Ste. 402
Baton Rouge, LA 70809
Telephone: (504) 928-6880

Attorneys for plaintiff
Mary Carole Halicki

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

Civil Action No. 95-1957

Division "A"
Section "M2"
MAGISTRATE (Jury Trial)

MARY CAROLE HALICKI

VERSUS

LOUISIANA CASINO CRUISES, INC.
d/b/a CASINO ROUGE

MEMORANDUM IN SUPPORT OF
EX PARTE MOTION TO EXTEND THE TIME
FOR FILING OF NOTICE OF APPEAL

MAY IT PLEASE THE COURT:

Plaintiff Mary Carole Halicki ("Ms. Halicki") has filed an alternative motion for leave of court requesting an extension of time to file her notice of appeal in the event that the court does not otherwise grant her relief from the March 5, 1997 summary judgment of dismissal under Federal Rules of Civil Procedure ("FRCP") 59(e) or 60(b).

In the event that the court finds plaintiff's FRCP 59(e) motion to have been untimely filed on March 21, 1997, Ms. Halicki's untimely submission resulted from a good faith error in the calculation of the time delay allowed

for Ms. Halicki's post-trial motion by her counsel. If any error was made, said error resulted in a two day delay in the submission of her post-trial motion. Ms. Halicki relied upon this submission of her post-trial motion on March 21, 1997 to suspend the necessity of a notice of appeal within thirty days of the March 5th judgment. Such an error based on this technicality in interpreting the various provisions of FRCP 6 in conjunction with FRCP 59(e) should not deprive plaintiff of her right to an appeal on the merits of the court's dismissal of her case on summary judgment. It is precisely this type of technicality, where Ms. Halicki believed her post-trial motion to have been timely filed and thus to have suspended the thirty day time period for her appeal, for which Federal Rule of Appellate Procedure ("FRAP") 4(a)(5) was enacted. FRAP 4(a)(5) is designed to protect litigants from being denied their day in Court on the merits because of a procedural technicality. FRAP 4(a)(5) states:

> The District Court, upon a showing of excusable neglect or good cause, may extend the time for filing of a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this FRAP 4(a). Any such motion which is filed before expiration of the prescribed time may be *ex parte* unless the court otherwise requires.

In *Cavaliere v. Allstate Insurance Company*, 996 F.2d 1111 (11th Cir. 1993) a District Court held that the three day mail rule did not apply to a plaintiff's motion for a new trial. Although Ms. Halicki disagrees with that holding for the reasons stated in her supplemental memorandum in support of her post-trial motion, the Eleventh Circuit acknowledged that FRAP 4(a)(5) does

"provide [a] mechanism[] that mitigate[s] the potential harsh effects of [FRAP] 4(a)(1)." In the *Cavaliere* decision the plaintiff was not entitled to relief under FRAP 4(a)(5) because the plaintiff failed to meet the additional thirty day deadline for filing a motion for extension of the time to appeal as FRAP 4(a)(5) requires. Id. at p. 1114.

In contrast, Ms. Halicki has hereby filed a motion for relief under Federal Rule of Appellate Procedure 4(a)(5) within the thirty day time period to request such an extension. Under the circumstances existing in this case, the court should exercise its great discretion to grant this relief. As the Eleventh Circuit stated in *Cavaliere*:

> "[W]hile Cavaliere's counsel may have had a good faith belief in their Rule 6(e) calculation, this fails to explain their lack of diligence after they were given cause to believe they were in error. During the time in which a motion under Rule 4(a)(5) would have been timely, [the defendant] Allstate's opposition to Cavaliere's new trial motion pointed out the error of Cavaliere's position, yet Cavaliere still let the time for filing a Rule 4(a)(5) lapse." *Id.* at pp. 1115-1116.

Ms. Halicki's counsel has made the same good faith calculation of the post-trial motion time period as did the counsel in *Cavaliere*. For the reasons previously stated in her supplemental memorandum is support of her post-trial motion, Ms. Halicki's counsel believes this calculation to be justified. The fact that similar calculations have been made in the past by other counsel illustrates that the application Rule 6(e) is not as clear as it should be even if the Court finds that FRCP 6(e) is not applicable to FRCP 59(e) post-trial motions.

However, unlike *Cavaliere*'s counsel, Ms. Halicki's counsel has by the filing of her motion under FRAP 4(a)(5) requested this court not to let this procedural technicality deprive Ms. Halicki of her right to a full appeal on the merits of her litigation. The *Cavaliere* decision suggests that because Ms. Halicki has paid timely attention to the alleged error in calculation by filing this FRAP 4(a)(5) motion, this Court should grant Ms. Halicki's request for an extension of time to file her notice of appeal in the interest of an equitable resolution based upon the factual evidence and the legal jurisprudence submitted by both sides, as opposed to a procedural technicality.

In *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 113 S.Ct. 1489, at pp. 1494-1495, the United States Supreme Court defined the "excusable neglect" standard, which has subsequently been held applicable to extension requests under FRAP 4(a)(5):

> Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control. ...
>
> With regard to determining whether a party's neglect of a deadline is excusable, we are in substantial agreement with the factors identified by the Court of Appeals. Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable," we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include, as the Court of Appeals found, the danger of prejudice to the [nonmovant], the length of the delay and its potential

> impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Pioneer Investment Services Company v. Brunswick Associates Limited Partnership, supra, 111 S.Ct. at p. 1495 and p. 1498.

In the case at bar, if it is held that Ms. Halicki's post-trial motion was filed two days late, Ms. Halicki should be allowed an extended time to file a notice of appeal under Pioneer's interpretation of FRAP 4(a)(5). Her request is filed two weeks after her notice of appeal would otherwise have been due if her post-trial motion did not suspend the original thirty day time period for her appeal. This two week extension will result in absolutely no prejudice to the legal position of the defendant Casino Rouge on the merits. It is apparent that Ms. Halicki acted in good faith and relied upon a reasonable interpretation of FRCP 6(e) in conjunction with FRCP 59(e). Moreover, granting Ms. Halicki leave to file her notice of appeal will not unduly delay this litigation or improperly impact these judicial proceedings. Justice and equity strongly argue in favor of decisions at both the trial court and appellate levels based on the facts and legal arguments presented by both sides, as opposed to a procedural error.

Ms. Halicki's post-trial motion and attached affidavits and supplemental affidavits demonstrate that Ms. Halicki worked diligently to prepare her post-trial motion within what her counsel viewed as the available time constraints. Given the fact that the court found Ms. Halicki's original affidavits in opposition to Casino Rouge's motion for summary judgment to be deficient, Ms. Halicki was

required to prepare and obtain additional affidavit testimony from witnesses in four states, Nevada, Iowa, Illinois and Louisiana, in order to supplement the record and to prepare her post-trial motion. Ms. Halicki was diligent in obtaining this additional evidence. Any good faith failure to properly calculate the deadline for post-trial motions should be excused under these circumstances, particularly as the judgment in question was not a judgment following trial on the merits, but was a summary judgment granted pursuant to FRCP 56.

In *United States v. Evbuomwan*, No. 93-1738 at 4 (5th Cir. Sept. 8, 1994), reported at 36 F.3d 89 (5th Cir. 1994) (table), an unpublished opinion, the Fifth Circuit Court of Appeals held that the Supreme Court's decision in *Pioneer* applied to the FRCP 4 standard for excusable neglect in a criminal case, which is the same excusable neglect standard under FRCP 4 pertaining to this civil case. *U.S. v. Clark*, 51 F.3d 42, at p. 44 (5th Cir. 1995), citing *United States v. Evbuomwan, supra.* Based on the *Pioneer* decision, the Fifth Circuit found counsel's misapplication of a three day mail rule—the precise issue currently before this Court—to be excusable neglect allowing the party additional time for an appeal.

The Fifth Circuit in *U.S. v. Clark*, noted that whereas it has previously held that a failure to understand and comply with the rules governing appeals will virtually never qualify as excusable neglect under FRCP 4, the Supreme Court's decision in *Pioneer* had abrogated the Fifth Circuit's prior case law strictly interpreting excusable neglect. *U.S. v. Clark, supra*, 51 F.3d at p. 43. The Fifth Circuit went on to state:

> This Circuit recognized before *Pioneer* that, "under proper circumstances", Rule 4(b)'s excusable neglect provision encompasses "ignorance or neglect

> of counsel in filing late notices of appeal." *United States v. Lewis*, 522 F.2d 1367, 1369 (5th Cir. 1975). Nevertheless, *Pioneer* does allow somewhat more room for judgment in determining whether mistakes of law are excusable than does the strict standard for excusable neglect espoused by some of our prior decisions. See *e.g.*, *Allied Steel*, 909 F.2d at 142. We recognized *Pioneer*'s flexibility in *Evbuomwan*. There, defense counsel "had failed to timely file the notice of appeal due to his misinterpretation of Fed.R.App.P. 26(c) (three extra days to respond to papers served by mail)." Op. at 3. The other *Pioneer* factors, furthermore, weighed in the defendant's favor. *Id.* at 5. The district court found the neglect excusable, and we affirmed, holding that the district court did not abuse its discretion under *Pioneer*. *Id.*

U.S. v. Clark, supra, 51 F.3d at p. 44. See also *Matter of Christopher* 35 F.3d 232 (5th Cir. 1994), in which the Fifth Circuit held that the District Court erred in refusing to consider an attorney's neglect in failing to file a pleading in accordance with a time deadline as excusable neglect under FRAP 4(a)(5).

The Fifth Circuit has affirmed a District Court's allowance of an additional time for appeal pursuant to FRAP 4(a)(5) where counsel improperly relied upon a motion to reconsider his post-trial motion to suspend the thirty day appeal period. *Wansor v. George Hantscho Company, Inc.*, 570 F.2d 1202, 1206 (5th Cir. 1978). In *Lackey v. Atlantic Richfield Company*, 990 F.2d 202, 206 (5th Cir. 1993) the Fifth Circuit affirmed a trial court's grant of an additional time for plaintiff's appeal pursuant to FRAP 4(a)(5) where plaintiff's counsel failed to properly interpret the procedural rule requiring the listing of each party individually in plaintiffs' original

notice of appeal. *Id.* at p. 206. The Fifth Circuit held that the grant of this FRAP 4(a)(5) motion was appropriate as the defendants were not prejudiced by this request. *Id.* at p. 206. See, also *In Re San Juan DuPont Plaza Hotel Fire Litigation*, 888 F.2d 940, 941-942 (1st Cir. 1989).

Finally in *Feeder Line Towing Service, Inc. v. Toledo, Peoria & Western Railroad Company*, 539 F.2d 1107, 1109 (7th Cir. 1976) the appellate court affirmed the District Court's grant of a FRAP 4(a)(5) extension to a defendant based upon its counsel's good faith, but erroneous, interpretation as to the controlling time period for a notice of appeal in a suit in admirality. *Feeder Line Towing Service, Inc. v. Toledo, Peoria & Western Railroad Company, supra*, 539 F.2d at p. 1109.

Likewise in the case at bar, Ms. Halicki's counsel did not simply ignore the thirty day time period for filing a notice of appeal of the March 5, 1997 judgment by failing to take any action before this Court. Rather, Ms. Halicki's counsel legitimately believed, and still believes, that thirty day period was suspended by the filing of her post-trial motion on March 21, 1997. As there is no evidence of any prejudice to Casino Rouge or to the judicial administration of this case, and as there is no indication of any bad faith on the part of Ms. Halicki, this Court should grant Ms. Halicki leave of court to notice her appeal pursuant to FRAP 4(a)(5) in the event Ms. Halicki is not granted post-trial relief from the March 5, 1997 judgment.

For the above and foregoing reasons, in the event that relief from the March 5, 1997 judgment of dismissal is not granted under FRCP 59(e) or 60(b), Ms. Halicki prays that her contemporaneous motion for leave of court for an extension of time to notice her appeal of the

March 5, 1997 judgment pursuant to FRAP (4)(5) be granted.

Respectfully submitted,

/s/ Stephen C. Carleton
Stephen C. Carleton (Bar #14132)
Timothy J. Poche (Bar #21823)
Simoneaux & Carleton, L.L.C.
8555 United Plaza Boulevard, Ste. 402
Baton Rouge, LA 70809
Telephone: (504) 928-6880

Attorneys for plaintiff
Mary Carole Halicki

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